

No. 19-575

In the Supreme Court of the United States

CHARTER COMMUNICATIONS, INC., ET AL.,
PETITIONERS

v.

STEVE GALLION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. No. 102-243, 105 Stat. 2394, generally prohibits the use of any “automatic telephone dialing system or an artificial or prerecorded voice” to “make any call” to “any telephone number assigned to a * * * cellular telephone service.” 47 U.S.C. 227(b)(1)(A)(iii) (Supp. V 2017). The TCPA excepts from that automated-call restriction any “call made for emergency purposes or made with the prior express consent of the called party.” *Ibid.* In 2015, Congress amended the TCPA to create an additional exception for calls “made solely to collect a debt owed to or guaranteed by the United States.” *Ibid.*

The private respondent in this case has alleged that petitioners used an automatic telephone dialing system and an artificial or prerecorded voice to call his cell phone for purposes *other than* the collection of government-backed debts, in violation of the TCPA. Petitioners have argued, and the court of appeals held, that the government-debt exception to the TCPA’s automated-call restriction violates the First Amendment. The court further held that the proper remedy was to sever the government-debt exception, leaving the basic automated-call restriction in place. The question presented is as follows:

Whether the government-debt exception to the TCPA’s automated-call restriction violates the First Amendment, and whether the proper remedy for any constitutional violation is to sever the exception from the remainder of the statute.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (C.D. Cal.):

Gallion v. Charter Commc'ns, Inc., No. 17-cv-1361
(Feb. 26, 2018)

United States Court of Appeals (9th Cir.):

Gallion v. Charter Commc'ns, Inc., No. 18-55667
(July 8, 2019), petition for reh'g denied, Sept. 16,
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the Federal Reporter but is reprinted at 772 Fed. Appx. 604. The order of the district court (Pet. App. 4a-28a) is reported at 287 F. Supp. 3d 920.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2019. A petition for rehearing was denied on September 16, 2019 (Pet. App. 29a-30a). The petition for a writ of certiorari was filed on November 1, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. No. 102-243,

(1)

105 Stat. 2394, in light of evidence that consumers “consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.” § 2(10), 105 Stat. 2394; see § 2(6), 105 Stat. 2394 (“Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.”). Since its enactment, the TCPA has generally prohibited “any person within the United States” from “mak[ing] any call * * * using any automatic telephone dialing system or an artificial or prerecorded voice” to “any telephone number assigned to a * * * cellular telephone service.” 47 U.S.C. 227(b)(1)(A)(iii) (Supp. V 2017); see TCPA § 3(a) [§ 227(b)(1)(A)(iii)], 105 Stat. 2395-2396. That prohibition is referred to here as the “automated-call restriction.” For purposes of that restriction, the statute defines “automatic telephone dialing system” to mean “equipment which has the capacity * * * (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” 47 U.S.C. 227(a)(1).

As originally enacted, the TCPA excepted from the automated-call restriction any “call made for emergency purposes or made with the prior express consent of the called party.” § 3(a) [§ 227(b)(1)(A)], 105 Stat. 2395-2396. In 2015, Congress enacted an amendment to the TCPA entitled “debt collection improvements.” Bipartisan Budget Act of 2015, Pub. L. No. 114-74, Tit. III, § 301, 129 Stat. 588 (capitalization and emphasis omitted). That amendment created an additional exception to the automated-call restriction for calls “made solely to collect a debt owed to or guaranteed by the United States.” § 301(a)(1)(A), 129 Stat. 588; see 47 U.S.C.

227(b)(1)(A)(iii) (Supp. V 2017). That exception is referred to here as the “government-debt exception.”

2. In 2017, respondent Steve Gallion brought a putative class action against petitioners, two telecommunications companies, alleging violations of the TCPA’s automated-call restriction. Compl. ¶¶ 1, 5-6, 15, 26-33. Gallion alleged that petitioners, in an effort to sell their services, had used an automatic telephone dialing system and an artificial or prerecorded voice to call his cell phone without his prior express consent. Compl. ¶¶ 9-14. Gallion sought statutory damages and injunctive relief. Compl. 7-8; see 47 U.S.C. 227(b)(3).

Petitioners filed a motion for judgment on the pleadings, arguing that they could not be held liable under the TCPA because the automated-call restriction is unconstitutional. D. Ct. Doc. 18, at 9-10 (Sept. 26, 2017). In particular, petitioners contended that the government-debt exception renders the automated-call restriction an impermissible form of content-based discrimination, in violation of the Free Speech Clause of the First Amendment. *Ibid.*

The United States intervened “for the limited purpose of defending the constitutionality” of the TCPA. D. Ct. Doc. 38, at 2 (Jan. 9, 2018); see 28 U.S.C. 2403(a) (requiring a court to “permit the United States to intervene * * * for argument on the question of constitutionality” when “the constitutionality of any Act of Congress affecting the public interest is drawn in question”). The United States argued that the automated-call restriction is a “content-neutral, time-place-and-manner restriction” that survives First Amendment scrutiny. D. Ct. Doc. 38, at 13.

The district court denied petitioners’ motion for judgment on the pleadings. Pet. App. 4a-28a. The court

held that the TCPA does not violate the First Amendment. *Id.* at 11a-23a. The court concluded that the “government-debt exception facially renders the TCPA a content-based restriction on speech,” *id.* at 23a, but that the statute survives strict scrutiny, *id.* at 16a-23a. The court explained that “the TCPA serves a compelling government interest in promoting and protecting residential privacy,” *id.* at 19a, and that the “government-debt exception does not do ‘appreciable damage’ to the privacy interests underlying the TCPA,” *id.* at 21a (citation omitted). Finding “the constitutionality of the TCPA” to be “a controlling question of law,” the district court certified its order for interlocutory appeal under 28 U.S.C. 1292(b). Pet. App. 24a.

3. The court of appeals granted permission to appeal under Section 1292(b), see 18-80031 C.A. Order 1 (May 22, 2018), and subsequently affirmed in an unpublished opinion, Pet. App. 1a-3a. Relying on its decision in *Duguid v. Facebook, Inc.*, 926 F.3d 1146 (9th Cir. 2019), petition for cert. pending, No. 19-511 (filed Oct. 17, 2019), the court held that the government-debt exception “is a content-based speech regulation that fails strict scrutiny, and thus is incompatible with the First Amendment.” Pet. App. 2a. The court observed, however, that in *Duguid*, it had “severed” the government-debt exception and had “left intact the remainder of the statute.” *Ibid.* In light of that holding, the court affirmed the district court’s denial of petitioners’ motion for judgment on the pleadings. *Ibid.*

4. The court of appeals denied rehearing en banc. Pet. App. 29a-30a.

DISCUSSION

The court of appeals invalidated part of an Act of Congress, holding that the government-debt exception

to the TCPA's restriction on automated calls violates the First Amendment. That holding is incorrect, and this Court usually grants review when a court of appeals has invalidated a provision of a federal statute. Two other pending petitions for writs of certiorari, however, present the same First Amendment and severability questions as the petition in this case. See Pet., *Facebook, Inc. v. Duguid*, No. 19-511 (filed Oct. 17, 2019) (19-511 Pet.); Pet., *Barr v. American Ass'n of Political Consultants, Inc. (AAPC)*, No. 19-631 (filed Nov. 14, 2019) (19-631 Pet.). Because *AAPC* provides the best vehicle for this Court's consideration of those questions, the Court should grant the petition for a writ of certiorari in *AAPC* and hold the petition in this case pending its disposition of *AAPC*.

1. The question presented in the petition for a writ of certiorari in this case encompasses the same First Amendment and severability issues as the question presented in the government's petition in *AAPC*. Those issues warrant this Court's review. 19-631 Pet. 14-16. Contrary to the conclusion of the court below, Pet. App. 2a, the applicability of the government-debt exception does not depend on the content of the speech at issue. Rather, it depends on the call's economic purpose (*i.e.*, whether the call is "made solely to collect a debt"), and on the existence of a specified economic relationship with the federal government (*i.e.*, whether the debt is "owed to or guaranteed by the United States"). 47 U.S.C. 227(b)(1)(A)(iii) (Supp. V 2017); see *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (recognizing that "restrictions on protected expression are distinct from restrictions on economic activity").

Thus, like the basic automated-call restriction itself, the government-debt exception is content-neutral.

19-631 Pet. 6-10. “[L]esser scrutiny” therefore is appropriate, and the TCPA satisfies that scrutiny. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2232 (2015); see 19-631 Pet. 11-14. Because the court of appeals invalidated a provision of a federal statute, further review is warranted. 19-631 Pet. 15-16; see, e.g., *Iancu v. Brunetti*, 139 S. Ct. 2294, 2298 (2019). And, for the reasons stated in our certiorari petition in *AAPC*, it would be appropriate for the Court to consider the issue of the proper remedy for any First Amendment violation as part of that review. 19-631 Pet. 14-15.

2. *AAPC* provides the best vehicle for this Court’s consideration of the First Amendment and severability issues encompassed within the question presented here. 19-631 Pet. 16-17. Unlike the certiorari petition in this case, the certiorari petition in *AAPC* seeks review of a published and fully reasoned court of appeals decision. See *American Ass’n of Political Consultants, Inc. v. FCC*, 923 F.3d 159 (4th Cir. 2019), petition for cert. pending, No. 19-631 (filed Nov. 14, 2019). And unlike the certiorari petition in *Duguid*, the certiorari petition in *AAPC* seeks review only of the First Amendment and severability issues. 19-631 Pet. I. The petition in *Duguid* presents an additional question of statutory interpretation, the resolution of which could render unnecessary any consideration of the First Amendment and severability issues in that case. 19-511 Pet. ii, 14, 23-34; see 19-631 Pet. 17. Because *AAPC* provides the best vehicle for this Court’s review, the Court should grant the certiorari petition in *AAPC* and hold the petition in this case pending its disposition of *AAPC*.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's consideration of the petition for a writ of certiorari in *Barr v. American Ass'n of Political Consultants, Inc.*, No. 19-631 (filed Nov. 14, 2019), and then disposed of as appropriate.

Respectfully submitted.

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